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6 Attorneys for Plaintiff
7 United States of America

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 07CR3347-JM
)	
11 Plaintiff,)	DATE: May 5, 2008
)	TIME: 9:00 a.m.
12 v.)	
)	
13 JOSE RUBEN NIETO-RESENDIZ,)	UNITED STATES' TRIAL
)	MEMORANDUM
14 Defendant.)	
)	
15 _____)	

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18 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
19 Karen P. Hewitt, United States Attorney, and David D. Leshner, Assistant United States Attorney,
20 and hereby files its Trial Memorandum.

21 **I**

22 **STATEMENT OF THE CASE**

23 **A. INDICTMENT**

24 On December 12, 2007, a federal grand jury in the Southern District of California returned a
25 one-count Indictment charging Defendant with a violation of 8 U.S.C. § 1326. Defendant entered a
26 plea of not guilty on January 4, 2008.

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1 **B. TRIAL STATUS**

2 A jury trial is scheduled for May 5, 2008, at 9:00 a.m. before the Honorable Jeffrey Miller,
3 United States District Judge. The United States expects its case-in-chief to last approximately one
4 day.

5 **C. DEFENSE COUNSEL**

6 Defendant is represented by appointed counsel, Shaffy Moeel, Esq.

7 **D. DEFENDANT'S CUSTODY STATUS**

8 Defendant is in custody.

9 **E. INTERPRETER**

10 The United States will not require the assistance of a Spanish-speaking interpreter for any of
11 its witnesses.

12 **F. JURY WAIVER**

13 Defendant has not filed a jury waiver.

14 **G. PRETRIAL MOTIONS**

15 On December 20, 2007, defendant filed a motion for discovery. The United States filed a
16 motion for fingerprint exemplars and reciprocal discovery on January 2, 2008. On April 21, 2008,
17 the parties filed motions in limine. The Court will hear all motions on May 5, 2008 at 9:00 a.m.

18 **H. STIPULATIONS**

19 The parties have not entered into any stipulations.

20 **I. DISCOVERY**

21 The Government has fully complied with its discovery obligations. To date, Defendant has
22 not provided reciprocal discovery.

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II

STATEMENT OF FACTS**A. Defendant's Apprehension**

On October 1, 2007, Border Patrol Agent F. Polo was performing line watch duties in Marron Valley, a rural area approximately seven miles west of the Tecate, CA Port of Entry and four miles north of the International Border. At approximately 12:30 p.m., Agent Polo responded to a seismic sensor activation south of his location. Following his arrival in the area of the sensor, Agent Polo observed Defendant and two other individuals attempting to conceal themselves in dense underbrush near a foot trail.

Agent Polo conducted field interviews of the three individuals. Defendant admitted to being a citizen of Mexico and to having illegally entered the United States through the mountains near Tecate, CA. Agent Polo placed all three individuals under arrest, and they were transported to the SR-94 Border Patrol checkpoint for processing.

At approximately 3:30 p.m. on October 1, Defendant received Miranda warnings and agreed to answer questions. Defendant stated that he is a citizen of Mexico and that he did not possess any documents allowing him to enter the United States. According to Defendant, he entered the United States from Mexico on September 30, 2007 by walking through the mountains west of Tecate, CA.

B. Defendant's Immigration History

Defendant is a citizen of Mexico. On July 26, 2007, Defendant was removed from the United States to Mexico pursuant to an Administrative Removal Order.

C. Defendant's Criminal History

On October 20, 2006, Defendant was convicted in Fresno County Superior Court of a felony count of committing lewd and lascivious acts upon a child under the age of 14 years, in violation of California Penal Code § 288(a). The Superior Court suspended imposition of judgment and sentence and placed Defendant on five years formal probation. A condition of that probation was that Defendant serve 365 days in jail.

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III

APPLICABLE LAW

To establish a violation of 8 U.S.C. § 1326, the United States must prove beyond a reasonable doubt that:

1. Defendant was deported from the United States;
2. After deportation, Defendant voluntarily entered the United States;
3. When Defendant entered he knew he was entering the United States or after Defendant entered the United States he knew that he was in the United States and knowingly remained;
4. Defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and
5. Defendant was an alien at the time of his entry into the United States.

Committee on Model Criminal Jury Instructions - Ninth Circuit, Manual of Model Jury Instructions for the Ninth Circuit, §9.5B (West ed. 2003, modified January 2007); United States v. Salazar-Gonzalez, 458 F.3d 851 (9th Cir. 2006).

IV

WITNESSES

The Government reserves the right to add, omit, substitute or change the order of witnesses. Presently, the Government intends to call the following witnesses during its case-in-chief:

1. United States Border Patrol Agent Franco Polo
2. United States Border Patrol Agent Jorge Salazar
3. David Beers, Fingerprint Expert

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V

EXHIBIT LIST

The Government will provide a final exhibit list on the morning of trial. Presently, the Government intends to offer into evidence the following:

1. Notice of Intent to Issue Final Administrative Removal Order
2. Final Administrative Removal Order
3. Warrant of Removal/Deportation
4. Certificate of Non-Existence
5. Advice of Rights form
6. October 1, 2007 videotaped statement and transcript
7. Fingerprint Card dated April 23, 2008
8. Photographs of apprehension area

VI

OTHER LEGAL ISSUES

All outstanding legal issues will be addressed at the May 5, 2008 motion hearing.

VII

PROPOSED VOIR DIRE

1. Of those of you who have sat on criminal juries, did any of those juries fail to reach a unanimous verdict?
2. Has anyone had an unpleasant experience with any law enforcement personnel?
3. Has anyone had any disputes with any agency of the United States Government?
4. Does anyone have relatives or close friends who have been investigated, arrested, accused or charged with a crime?
5. Does anyone have relatives or close friends who have been deported or removed?
6. Does anyone have strong feelings about the United States Border Patrol or any other federal agency involved in immigration issues?
7. Does anyone believe that our country's immigration laws are too harsh?

- 1 8. Does anyone believe everyone should be allowed to enter the United States?
- 2 9. Does anyone believe that it should legal to enter the United States without authorization?
- 3 10. Does everyone understand that as a juror your duty is to apply the law regardless of
- 4 whether you disagree with it?
- 5 11. Does everyone understand that the laws of the United States equally apply to everyone
- 6 who enters the United States?
- 7 12. Does everyone understand that as a juror you are not to consider prejudice, pity or
- 8 sympathy in deciding whether the Defendant is guilty or not guilty?
- 9 13. Does anyone think that, regardless of the strength of the evidence, they will have trouble
- 10 deciding whether the Defendant is guilty or not guilty?
- 11 14. Does anyone think they cannot decide whether a person is guilty or not guilty?
- 12 15. Does anyone have religious or moral beliefs which will make it difficult for them to
- 13 make a decision strictly based on the law and facts of this case?

14 **VIII**

15 **JURY INSTRUCTIONS**

16 The United States will submit proposed jury instructions under separate cover.

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18 DATED: April 28, 2008.

Respectfully submitted,

19 Karen P. Hewitt
20 United States Attorney

21 s/ David D. Leshner
22 DAVID D. LESHNER
23 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 07CR3347-JM
)	
Plaintiff,)	
)	
v.)	
)	CERTIFICATE OF SERVICE
JOSE RAMON NIETO-RESENDIZ,)	
)	
Defendant.)	

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age.
My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' TRIAL MEMORANDUM** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Shaffy Moeel, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 28, 2008.

/s/ David D. Leshner
DAVID D. LESHNER